

ESTATE OF ROE KAHRAHRAH

(Deceased Comanche Unallotted)

IBIA 74-26

Decided October 18, 1974

Appeal from an order denying petition for rehearing.

Reversed in Part And Remanded.

1. Indian Probate: State Law: Applicability to Indian Probate, Testate

A state law which provides that a child who is not named or provided for in the will of his parent shall take as if the testator died intestate, is not applicable to Indian wills.

2. Indian Probate: State Law: Applicability to Indian Probate, Testate

A state law providing that a child shall take as if the parent died intestate if the child is not named

or provided for in his will does not apply to Indian wills executed pursuant to 25 U.S.C. § 373.

APPEARANCES: Richard S. Roberts, for Alicia Faye Kahrahrhah Wilson, Bertha Komacheet Kahrahrhah, Phoebe Ann Kahrahrhah Heath and Bernard Kahrahrhah, appellants; Vincent Knight of the Legal Aid Society of Oklahoma County, Inc., for Krandall Roe Kahrahrhah, a minor, appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

Alicia Faye Kahrahrhah Wilson, Bertha Komacheet Kahrahrhah, Phoebe Ann Kahrahrhah Heath and Bernard Kahrahrhah, hereinafter referred to as appellants, through their attorney, Richard S. Roberts, have appealed from a decision of an Administrative Law Judge, dated November 9, 1973, denying their petition for rehearing of the estate herein whereon an Order Approving Will and Decreeing Distribution was issued on May 11, 1973.

Roe Kahrahrhah, hereinafter referred to as testator, an unallotted Comanche Indian of the State of Oklahoma, died testate on November 19, 1971, at the age of 56 years.

After being duly noticed, a hearing was held at

Anadarko, Oklahoma, on March 8, 1973, for the purpose of ascertaining the heirs at law of the testator, claims against the estate, if any, and the probate of the purported last will and testament dated December 12, 1968. From the evidence adduced at the hearing the decedent's last will and testament of December 12, 1968, was approved by the Judge.

The testator in said will and testament, as approved, made specific devises of trust interest to the appellants. The rest and residue of his trust estate, if any there be, was devised to his estranged wife, Bertha Komacheet Kahrahrhah.

The Judge in his Order Approving Will and Decreeing Distribution, dated May 11, 1973, awarded to Krandall Roe Kahrahrhah, appellee herein, as a posthumous son, an undivided one-sixth interest in all of the testator's trust and restricted property thereby reducing the respective interests of the devisees to an undivided five-sixth interest.

Phoebe Ann Kahrahrhah Heath, one of the devisees, filed a petition for rehearing on July 2, 1973, setting forth the following reasons in support of her petition:

1. Said Order is unjust to the decedent and to this lawfully designated beneficiary and is contrary to law.
2. Said order approved claims without proof as required by rules and regulations for the protection of restricted Indians.
3. Said Order is contrary to the Laws of the State of Oklahoma as regards Descent and Distribution where an illegitimate child offers no proof of paternity. There is no proof that the child named Krاندall Roe Kahrahrāh in his birth certificate is the son of the deceased Roe Kahrahrāh.
4. Said Order constitutes an arbitrary substitution, in fact and in law, of the opinion of the Administrative Law Judge which is contrary to the material relevant and competent evidence. Krاندall Roe Kahrahrāh should not be entitled to a 1/6 interest in this Estate.
5. Said Order fails to consider that the beneficiaries were without counsel and as a result were unable to have their day in court.
6. The DATA FOR HEIRSHIP FINDING AND FAMILY HISTORY which lists Esther Jean Parker as a common law wife and Krاندall Roe Kahrahrāh as a son is without foundation or fact.

The Judge on November 9, 1973, denied the petition for rehearing. Bernard Kahrahrāh, for himself, and for the other devisees, under the will of December 12, 1968, filed on January 3, 1974, a timely appeal from the denial.

Aside from the issue of the validity of creditors' claims, the reasons given in support of the appeal are substantially the same as those given in the petition for

rehearing hereinabove set forth and need not be repeated.

Considering the reasons, there appears to be only one issue to be resolved by this Board, which is:

Was the Judge in error in holding that the posthumous son was entitled to share in a testator's estate as if he had died intestate?

We disagree with the Judge in holding that the posthumous son was entitled under state law (84 Okla. Stat. Ann. § 131 (1970)) to share in the testator's estate as if he had died intestate.

[1 & 2] In the Estate of Loretta Pederson, 1 IBIA 14, 77 I.D. 270 (1970) this Board held that a state law which provides that a child who is not named or provided for in the will of his parents shall take as if the testator died intestate is not applicable to Indian wills and that such wills are governed by federal law, Act of February 14, 1913, 37 Stat. 678 and regulations promulgated by the Secretary of the Interior. (Emphasis added.)

The purpose of the February 14, 1913 Act, supra, was to allow Indians a right to make a will disposing of

trust property free of state restrictions as to portions to be conveyed and as to the object of the testator's bounty, Blanset v. Cardin, 256 U.S. 319 (1921). It is well settled that a state law which provides that when a child is not mentioned in a will he shall take an intestate's share has no application to Indian wills. Estate of Harry Shale, IA-880 (November 21, 1958). The Examiner (now Administrative Law Judge) is not bound to apply a state statute regarding pretermitted heirs. Estate of Charles Clement Richard, IA-1260 (July 15, 1963). Absent an act of Congress, the Secretary, in determining the rights of pretermitted heirs in Indian probate matters, will not follow any state statutes dealing with the subject. Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971).

In light of the foregoing decisions, the decision of the Judge in allowing Krandal Kahrahrh by virtue of 84 Oklahoma Statutes Annotated § 131 (1970), an undivided one-sixth share in the testator's trust estate as if the testator had died intestate, should be reversed and the matter remanded to the Judge for the issuance of an appropriate order consistent with this decision and with the provisions of the approved last will and testament of Roe Kahrahrh, dated December 12, 1968.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge, dated July 7, 1972, only insofar as it allows Krandall Kahrahrah an undivided one-sixth interest in the estate herein is REVERSED and the matter is REMANDED to the Judge for the purpose of issuing an appropriate order consistent with this opinion and with the provisions of Roe Kahrahrah's will of December 12, 1968.

This decision is final for the Department.

Alexander H. Wilson
Administrative Judge

I concur:

Mitchell J. Sabagh
Administrative Judge